

Doerfer Engineering, a division of Container Corporation of America, an affiliate of the Jefferson Smurfit Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 1740. Case 18-CA-12507

December 22, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On August 23, 1994, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Doerfer Engineering, a division of Container Corporation of America, an affiliate of the Jefferson Smurfit Corporation, Cedar Falls, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

James L. Fox, Esq., for the General Counsel.

Thomas M. Hanna, Esq. (McMahon, Berger, Hanna, Linihan, Cody & McCarthy), of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I was assigned the above-captioned case by order of the Deputy Chief Administrative Law Judge for the San Francisco, California office of the Division of Judges Earle V.S. Robins, dated May 19, 1994. That order accepted the stipulation, waiver, and motion of the General Counsel, Respondent, and the Charging Party filed May 10, 1994, waiving their rights to a hearing and oral argument before an administrative law judge, designating a stipulated record and moving that the matter be decided on the basis of the record and briefs.

The matter arose with the filing of a charge on January 12, 1993, docketed as Case 18-CA-12507 by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 1740 (the Union or the Charging Party) against Doerfer Engineering, a division of Container Corporation of America, an affiliate of the Jefferson Smurfit Corporation. Following an initial deferral of the charge to arbitration, the Regional Director for Re-

gion 18 of the National Labor Relations Board (the Regional Director) revoked his deferral of the charge and issued a complaint on February 4, 1994, and an amended complaint on February 17, 1994. Respondent filed an answer to complaint on February 17, 1994, and an answer to the amended complaint on February 24, 1994.

The complaint alleges that Respondent unilaterally changed a term and condition of employment respecting a unit of its employees represented by the Charging Party in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondent does not dispute the initiation of a unilateral change but avers first that the charge has been resolved by an arbitration decision and award to which the Board must defer and, second, that it had no obligation to bargain with the Union respecting the change under the Act.

On the entire record here including helpful briefs from the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a corporation with an office and place of business in Cedar Falls, Iowa, has been engaged in the manufacture and nonretail sale and distribution of machine tools. During the calendar year ending December 31, 1993, Respondent, in conducting its business operation, purchased and received at its Cedar Falls facility goods valued in excess of \$50,000 directly from points outside the State of Iowa and from the same location sold and shipped goods valued in excess of \$50,000 directly to points outside the State of Iowa.

Based on the above, the complaint alleges, the answer admits, and I find that Respondent at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties stipulated and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. History and Events

1. Background

Respondent designs and builds proprietary machines and related equipment for other enterprises and has for a number of years. On December 12, 1975, in Case 18-RC-10686 the Union was certified as the exclusive representative of Respondent's employees in the following unit (the unit):

All production and maintenance employees employed at its plant located at highway 218 North, Cedar Falls, Iowa; excluding office clerical employees, quoters-expecters, professional employees, guards and supervisors as defined in the Act, and all employees employed at its Office, Engineering and Technical Centers located at 201 Washington Street, Cedar Falls, Iowa and all other employees.

The unit comprises some 50-odd employees—about half of Respondent's total employee complement.

The unit has at all material times been appropriate for collective bargaining within the meaning of Section 9 of the Act. At all times following the certification the Union has continued to represent unit employees and has been recognized by Respondent as the exclusive representative of unit employees for purposes of collective bargaining. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from February 1, 1992, to January 31, 1995.

2. The practice

Respondent had from its inception almost 30 years ago—a time predating recognition of the Union as representative of unit employees—allowed unit employees under regulated circumstances to utilize Respondent's tools and equipment at the facility for personal projects and endeavors. In addition to use of equipment on Respondent's premises, employees with prior approval could take certain tools home and also could utilize Respondent's parts and part ordering facilities, paying for materials used. Collectively, the right to use plant premises, Respondent's tools and equipment, and Respondent's parts and parts ordering facility are referred to hereinafter as the practice. These opportunities were conditioned on employer approval of various aspects of the practice and violation of Respondent's rules and regulations respecting the practice could and historically did result in discipline of unit employees up to and including discharge. Historically Respondent amended its regulations respecting the practice without notifying or bargaining with the Union. The practice was never raised in contract negotiations. Until the events in issue, Respondent had continuously offered these opportunities and employees had regularly utilized them.

Respondent over time became increasingly sensitive to the costs and burdens the practice placed on it. Thus, employee use of Respondent's equipment, both at Respondent's premises and away from the premises, involved "wear and tear," loss or damage of equipment, and loss of employee productivity and raised issues of Respondent's legal liability and maintenance of plant security.

Robert Plante, Respondent's general manager, took the decision to discontinue the practice. On January 4, 1993, Ralph Greenwood, plant manager, met with a union committee and provided them with a written notice announcing discontinuance of the practice. The notice was subsequently posted at the plant and the practice discontinued. Respondent simply announced its decision and neither notified the Union before the decision was taken nor offered to bargain respecting the decision.

3. Grievance and arbitration of the discontinuance of the practice

The Union filed a grievance on January 21, 1993, contending that the tool use was a practice "never taken away during open contract negotiations" and seeking reinstatement of the practice. Respondent asserted business reasons for discontinuance and the management-rights clause of the collective-bargaining agreement, article XX, as permitting the action. Article XX states in part:

Management Rights

The Union recognizes that the Company is vested exclusively with the Management of the Plant, the direction of all work, and the working force, for which functions the Company retains full rights and powers. Without limiting the generality of the foregoing, this includes the right to . . . enforce reasonable shop rules to carry out the functions of Management, except to the extent this Agreement specifically provides otherwise.

The Company retains the sole right to determine the extent to which its Plant or any part thereof shall be operated or shut down The right to establish manufacturing standards and tolerances and the scheduling of operations and the choice of equipment for various jobs, shall be the right of the Company.

Each side cleaved to its position through the grievance process. Respondent also took the position that the grievance was not properly arbitrable. The Union disagreed.

An arbitration was held on May 21, 1993, before Arbitrator Kent Hutcheson. He issued his opinion and award on August 5, 1993. The award is reproduced in full in Appendix I (omitted from publication), *infra*. The parties stipulated that the arbitration proceedings were fair and regular and that the parties had agreed to be bound by the arbitrator's award.

B. Analysis and Conclusions

1. The issue of deference to the arbitrator's opinion and award

a. Identification of deferral issues and arguments

The Board in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), adopted a policy of deferral to arbitral decisions in order to encourage voluntary settlement of labor disputes. In deciding whether deferral is appropriate in a given case, the Board in *Spielberg* considered: (1) whether the proceedings were fair and regular; (2) whether all parties agreed to be bound; and (3) whether the arbitrator's decision is repugnant to the purposes and policies of the Act. In *Raytheon Co.*, 140 NLRB 883 (1963), the Board declined to defer to an arbitration award based on a determination that the arbitrator had considered only the contract grievance issue and not the statutory questions underlying the unfair labor practice charge and complaint. The Board required as a precondition to deferral that the arbitral forum had "considered" the unfair labor practice issue.

This "considered" requirement has evolved over the course of time. The Board in *Olin Corp.*, 268 NLRB 573, 574 (1984), again addressed the issue announcing the following standard for deferral to arbitration awards:

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Footnote omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with re-

gard to the inquiry into the “clearly repugnant” standard, we would not require an arbitrator’s award to be totally consistent with Board precedent. Unless the award is “palpably wrong” [footnote omitted], i.e. unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, we will defer.

The Board held further in *Olin* that the party seeking to have the Board ignore the determination of the arbitrator bore the burden of affirmatively demonstrating the defects in the arbitral process or award.

The General Counsel makes two independent arguments that the arbitration award should be disregarded in this case. First, the General Counsel argues that the arbitrator accepted Respondent’s argument that the grievance was not an arbitrable issue and, on that basis, denied the grievance. The General Counsel argues in effect that deferral is only appropriate when the arbitrator has applied the contract to resolve the grievance one way or the other. Where an arbitrator finds the dispute not to be resolvable under the arbitration provisions of the contract, that decision makes the arbitrator’s decision irrelevant to the dispute under the Act and it must be disregarded. Counsel for the General Counsel on brief cites *Southwestern Bell Telephone Co.*, 198 NLRB 569, 570 (1972), wherein the Board states it will not defer to an arbitrator’s decision if that decision “has been found by the arbitrator not to be arbitral.”

Respondent does not challenge the legal proposition advanced by the General Counsel, but rather asserts the General Counsel mischaracterizes the arbitrator’s opinion and award by engaging in a “semantic seizure” of the language of the award portion of the arbitrator’s opinion and award while ignoring the remainder of the document. A fair reading of the arbitrator’s decision in its entirety, argues Respondent, shows that the arbitrator did in fact resolve the arbitration in a manner worthy of deference under Board and court standards.

The General Counsel’s second argument respecting the deferral issue is that the arbitrator’s conclusion is inconsistent with the purposes and policies of the Act. Since the arbitrator’s opinion and award is contrary to Board law and not susceptible to an interpretation consistent with the Act, argues the General Counsel, deferral is inappropriate under *Spielberg Mfg. Co.*, supra, and its progeny. Respondent argues that the arbitrator’s opinion and award is reasonably susceptible to an interpretation consistent with the Act and is therefore properly deferrable under *Olin Corp.*, 268 NLRB 573, 576 (1984).

b. *Did the arbitrator determine the grievance was not arbitrable?*

(1) The language of the arbitrator’s opinion and award

The entire opinion and award is set forth in Appendix I, infra. The opinion and award is divided into various portions. The “issue” portion is as follows, capitalization and underlining in original:

THE ISSUE

A. IS THE MATTER ONE ABOUT WHICH THE COMPANY IS COMPELLED TO NEGOTIATE AND THUS ARBITRATE?

B. DID THE COMPANY HAVE THE RIGHT TO TERMINATE THE PERSONAL USE OF COMPANY TOOLS AND EQUIPMENT AFTER HOURS BY BARGAINING UNIT EMPLOYEES?

The portion of the opinion and award entitled “*OPINION*” begins:

The issue as to arbitrability has been raised and must first be addressed. The Company objected to the entire proceedings on the grounds that this matter is not one about which the company is obligated to bargain with the union.

The opinion portion discusses the matter and continues:

The Union argues that this is a past practice which has been in effect for more than a quarter of a century and is essentially a benefit to the employees which cannot be terminated unilaterally by the company without proper notice and subsequent negotiation.

If the company can refuse each incident or each request by an employee then the practice can be terminated simply by refusing ALL REQUESTS [capitalization in original]. There is absolutely no argument that the company in the exercise of its rights can refuse each request therefore it can refuse every request. It would be false reasoning to determine that the company can determine every request but it cannot terminate the practice.

The opinion portion concludes with general admonitions for good labor management relations and the opinion and award continues as follows to its conclusion:

RULING

The Company had a right to unilaterally terminate the practice of loaning tools, equipment and materials and permitting use of company premises for personal use.

AWARD

The Grievance is not arbitrable and is therefore denied.

Kent Hutcheson

DATED THIS 5TH DAY OF AUGUST, 1993

(2) Conclusions concerning the arbitrator’s findings respecting arbitrability

Respondent correctly notes that the arbitrator’s decision must be read in its entirety to fairly determine its meaning. Further, Respondent correctly notes the burden is on the General and the Charging Party here to prove that the arbitrator specifically determined that the grievance was not arbitrable in that they argue the opinion and award should not be deferred to. It is also true that the arbitrator’s decision is not a model of clarity and seems to blend issues of negotiability and arbitrability. It is clear that the arbitrator’s opinion and award does not confine itself to a pure, isolated determination that the matter was simply not properly arbitrable.

Irrespective of all the above, I conclude that the arbitrator did in fact rule that the grievance was not arbitrable and that his award did not for that reason reach the merits of the unfair labor practice issue. As noted in the portions of the arbitrator's opinion and award quoted immediately above, the arbitrator squarely recognized: "The issue of arbitrability was raised and must *first* [emphasis added] be addressed." His award, the action portion of his opinion and award, states in its entirety: "The Grievance is not arbitrable and is therefore denied." The clarity of these unambiguous assertions, in my view, requires that they be taken at their face value irrespective of dicta in the opinion which suggests the arbitrator had views beyond the issue of arbitrability.

There is no confusion about these quoted statements including, in particular, the award language itself, which requires or even allows the remainder of the opinion and award to modify the clear holding of the award itself. This is especially true where the remainder of the arbitrator's opinion and award does not contradict the explicit finding of nonarbitrability.

In effect what Respondent seeks that I do here is find that the arbitrator did not mean to answer the issue the opinion and award specifically holds is the first issue to be addressed. Further, Respondent argues that the specific language of the award which decides that threshold issue is to be disregarded. On this record there is no reason not to give the arbitrator's language its plain meaning. Indeed, I believe to disregard Arbitrator Hutcheson's unambiguous ruling on an issue he specifically held should be resolved at the threshold of his decision would be unfair to both the arbitrator and to the process of arbitration long favored by the courts.

Having determined that the arbitrator's August 5, 1993 opinion and award held the grievance to be "not arbitrable," it is unnecessary to determine if the arbitrator's decision is also not properly deferred to because it does not meet other aspects of the Board requirements for deferral as argued by the General Counsel and opposed by Respondent.

c. Conclusions respecting deferral

Having concluded above that the arbitrator's opinion and award determined that the Union's grievance was not arbitrable, it follows, based on the General Counsel's cited case, *Southwestern Bell Telephone Co.*, 198 NLRB 569, 570 (1972), that deferral is inappropriate. Accordingly, I shall not defer the unfair labor practice allegations of the complaint to Arbitrator Kent Hutcheson's August 5, 1993 opinion and award.

2. Did Respondent's unilateral discontinuance of the practice violate the Act?

a. Narrowing of the issues

The stipulated record and the posthearing briefs of the parties admirably narrow the focus of the arguments respecting the propriety of Respondent's unilateral discontinuance of the practice. There is no dispute that the Union has for many years represented a unit of Respondent's employees who were allowed to use Respondent's tools and equipment at the facility for their personal affairs and to take Respondent's tools away from the facility for similar purposes. There is also no dispute that Respondent discontinued this practice unilaterally on January 4, 1993, without notifying or provid-

ing the Union with an opportunity to bargain respecting the matter. Finally there is no contention that the Charging Party's conduct thereafter constitutes a waiver of its claims here.

The parties start with the basic proposition that employers generally must bargain with their employees' representatives respecting terms and conditions of employment. The General Counsel argues that this simple proposition applies here and that Respondent was obligated to notify and provide the Union with an opportunity to bargain about the discontinuance of the practice before the employer took any action. Respondent asserts several defenses. First, Respondent argues that the practice was independent of the employment relationship and was a mere gratuity about which Respondent had no obligation to bargain. Second, Respondent argues that the decision to terminate the practice was an entrepreneurial decision about which Respondent had no notification or bargaining obligation. Further Respondent asserts its actions were permitted as a result of the contract and bargaining history respecting the practice. The General Counsel challenges each defense.

b. Was the practice at issue here a gratuity about which there is no obligation to bargain?

In support of its gratuity argument, Respondent cites the cases *Benchmark Industries*, 270 NLRB 22 (1984), and *Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965). In *Benchmark* the Board considered the unilateral discontinuance by an employer of a practice of holding Christmas dinners for employees or giving 5-pound Christmas hams to employees. The Board majority found the hams to be merely gifts and further asserted the view that litigation of the propriety of an employer's discontinuance of a dinner and a 5-pound ham, given once a year, did not further the purposes and policies of the Act. In *Wonder State*, a decision cited with approval in *Benchmark*, the Eighth Circuit reversed the Board and found an irregular Christmas bonus given to all employees to be a gift and not a term and condition of employment about which Respondent was obligated to bargain.

The General Counsel seeks to distinguish *Benchmark* by advancing the subsequent Board cases *Owens-Corning Fiberglass*, 282 NLRB 609 (1987), and *Getty Refining Co.*, 279 NLRB 924 (1986). *Owens-Corning Fiberglass* held that a longstanding employee right to purchase the employer's products was a mandatory subject of bargaining and specifically distinguished *Benchmark* as limited to token gifts. Getty reached the same conclusion with respect to an employee social fund administered by the employer. The Board specifically found the fund to be a significant economic benefit to employees and an integral part of the employees' total economic package.

The cases cited by the parties and other cases on the issue make it clear that the distinctions here are ones of fact and require consideration of the practice or practices which were discontinued. It is appropriate then to consider the practice from the employees' perspective.

Sixteen year unit employee and union official Paul Brietske testified at the arbitration that during his job application process with Respondent he received a tour of the shop at which time he was informed by the touring foreman of the practices at issue here. Brietske further testified that the opportunity to use Respondent's tools and facility after hours was a critical factor in staying with Respondent rather

than taking other employment offering more money and benefits but not the opportunities at issue here. Asked whether other employees took advantage of the practice of using Respondent's tools he answered: "In my opinion, every person there has used that benefit at one time or another, and some use it quite a bit."

It should not be considered surprising that production unit employees of an employer which manufactures machine tools would have the interest, talent, and desire to utilize the expensive and specialized equipment, facility, and parts which Respondent provided through the years. Brietske's litany of personal projects completed over the years utilizing the practice at issue here is lengthy and multifarious.

Respondent points out that the practice is an unreasonable burden on Respondent in that there are substantial costs involved in replacing perishable and lost tools, in supplying and monitoring the use of the tools and facility and potential liabilities in allowing its premises and tools and parts to be used by employees for their own projects. The General Counsel does not dispute these assertions. While the costs to Respondent are not a strict determinant of the benefits to employees, it is clear that employees are benefiting from an expensive opportunity and one that is not likely to be cheaply or easily replaced. The area of inquiry in this aspect of the case, however, is the benefit to employees of the existing practice rather than the cost to the employer.

Given all the above, I find that the benefit to unit employees of the use of Respondent's tools, parts, and premises for their personal business or interests, as described more particularly supra, is substantial. The benefit is at least partially monetary—some employees have used the practice in the operation of independent commercial activities. Many have used the practice to undertake "do it yourself" projects which resulted in indirect savings. It is also clearly nonmonetary in that the practice has allowed employees to pursue interests and hobbies which, while not necessarily remunerative, give great satisfaction. The fact that not all employees may utilize the opportunities the practice offers with the same frequency does not diminish the overall value to the unit as a whole. It is clear that the practice is neither a rarely used or token benefit for employees, but is rather an valuable, integral part of the unit employees' terms and conditions of employment.

I find therefore that the practice involved here is a substantial benefit to unit employees. The practice, although increasingly regulated over time, is one which has been in place for many years. These factors under the cases cited supra convince me that the practice is not a simple token or gratuity respecting which the Board should not concern itself. Respondent's gratuity argument is therefore rejected on the facts of the case.

c. Was the decision to terminate the practice an entrepreneurial decision not requiring notice and bargaining with the Union?

Respondent in its brief argues that the entrepreneurial nature of its decision to terminate the practice involved here is exempt from a bargaining obligation in three ways. First Respondent notes that its rationale for terminating the practice was primarily grounded in concerns over legal liability and only secondarily based on operational costs and employee

loss of efficiency. Based on this assertion counsel for Respondent argues on brief at 12:

None of these matters constitute "wages, hours, and other terms and conditions of employment" within the meaning of section 8(d) of the Act, which means that "... each party is free to bargain or not to bargain" *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349, 42 LRRM 2034. See also *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 57 LRRM 2609 [(1964)] where the Court noted that some management decisions have only an indirect and attenuated impact on the employment relationship. 379 U.S. at 233.

I do not believe the cited cases sustain Respondent's argument here. I have found, supra, that the benefits to unit employees of the practice at issue here was both substantial and a term and condition of employment. Thus the decision of Respondent to end the practice clearly had more than an "indirect and attenuated impact on the employment relationship" which is the key language quoted by Respondent from *Fibreboard*.

Further, counsel for Respondent errs when he argues that since Respondent's motives for ending the practice were not based on unit employees' wages, hours, and conditions of employment, it was free to make any changes it desired. It is not the employer's motive that is at issue in this aspect of the case under the cases cited, but rather the change in working conditions that in fact occurred.

Respondent also argues that Respondent's decisions respecting employees' use of its facility and tools

falls within the exclusive ambit of management decision-making because the Union has no right to expose Doerfer to the risk of liability the practice presents, especially in today's litigation-oriented society. [Br. 12.]

Respondent cites *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), in support of its argument.

The Board and courts have evolved a line of cases, including *First National*, which hold that certain types of employer decisions involving major business changes need not be bargained over irrespective of the substantial impact on unit employees. These cases however are limited to core business decisions. Respondent's decision to discontinue the practice is simply not such a core decision. Irrespective of the importance which Respondent views the termination of the practice, it does not change the basic operations of the enterprise as required under the cases. Accordingly, Respondent's cases are distinguishable and its argument must fail.

Respondent argues that negotiations with the Union over the elimination of the practice would have been a futility or "needless burden" because "Doerfer's concerns were real and rational and there is nothing the [Union] could do to allay these concerns" (Br. 12). Respondent notes the stipulated facts that Respondent's general manager, who made the decision to terminate the practice, knows of nothing the Union could have said, done, or offered that would have alleviated his concerns regarding possible civil liability and thus caused him to abandon his desire to terminate the practice. Further the stipulation notes that the general manager would testify that, after the decision, the Union offered nothing,

other than objections and argument, in support of its request that the rule be withdrawn.

Chief Justice Warren writing for the majority in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 214 (1964), addressed the “futility” issue:

Yet, it is contended that when an employer can effect cost savings in these respects . . . there is no need to attempt to achieve similar economies through negotiation with existing employees or provide them with an opportunity to bargain a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation. . . .

While “the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position,” *Labor Board v. American Nat. Ins. Co.*, 343 U.S. 395, 404, it at least demands that the issue be submitted to the mediatory influence of collective negotiations. As the Court of Appeals pointed out, “[i]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management’s legitimate complaints” [Quoting 322 F.2d 411, 415 (D.C. Cir. 1963).]

I am unable to conclude from this record or the nature of the change that Respondent undertook, that the decision of Respondent was so immune from being influenced by the Union, that bargaining would be a futility and thus was unnecessary under Board law.

d. *Was Respondent’s failure to give notice to and an opportunity to bargain to the Union respecting the decision to terminate the practice allowed or justified by the contract and/or the parties’ bargaining history?*

The contract’s management-rights clause is quoted in full, *supra*. Respondent suggests that any bargaining obligation it might otherwise have had respecting the practice at issue was eliminated by that clause. Respondent further argues that the various aspects of the practice at issue here were never mentioned in bargaining and, further, have been the subject of unilateral action in the past by Respondent without complaint by the Union.

The General Counsel cites *Owens-Corning Fiberglass*, 282 NLRB 609 (1987), for the proposition that neither an absence of bargaining respecting a subject nor a history of unilateral action by an employer with respect to that subject matter diminishes, waives, or otherwise limits a labor organization’s statutory right to bargain over changes. That case is determinative of the issue.

The General Counsel also cites *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989), and the cases cited there, for the proposition that generally worded management-rights clauses will not be construed to waive statutory bargaining rights. The clause at issue here is such a clause and therefore does not allow the unilateral elimination of the practice at issue here. The argument that since Respondent is allowed

to regulate its work rules which include the regulation of the practices here and therefore may eliminate the practice entirely as a simple regulatory act is not tenable. Simply put, the right to reasonably regulate does not automatically include the right to eliminate.

e. *Conclusion*

I have found that Respondent’s practice is a significant benefit to unit employees and is an important part of the unit employees’ terms and conditions of employment. I have further found that Respondent’s unilateral decision to terminate the practice without notifying or providing the Union an opportunity to bargain over the decision was neither a de minimus or trivial matter nor a decision at the heart of the managerial enterprise or otherwise exempt from that neither the contract nor the bargaining history respecting the practice diminished the Union’s statutory bargaining rights.

Based on the above, I further find that Respondent was obligated to provide notice to and an opportunity to bargain to the Union respecting changes in employees’ terms and conditions of employment. Respondent did not give such notice nor opportunity to bargain to the Union before it unilaterally terminated the practice at issue here. Accordingly, I find Respondent’s failure to notify and provide the Union an opportunity to bargain respecting the decision to terminate the practice and the termination itself violate Respondent’s obligation to bargain in good faith with the exclusive representative of unit employees. I therefore sustain the allegation of the complaint that Respondent by its January 4, 1993 action violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the purposes and policies of the Act including the posting of a remedial notice.

The remedy for Respondent’s failure to notify the Union and give it an opportunity to bargain respecting the termination of the practice described above shall include restoration of the improperly terminated practice. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215–216 (1964). The practice shall be maintained by Respondent until such time as it gives proper notice to and an opportunity to the Union to bargain respecting the termination of the practice.

As the Board directed in *Owens-Corning Fiberglass*, 282 NLRB 609, 610 (1987), and *Getty Refining Co.*, 279 NLRB 924 (1986), I shall include a provision that Respondent make unit employees whole for any and all losses suffered by them as a result of the improper termination of the privilege, with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp.*, 231 NLRB 651 (1977); and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

On the basis of the above findings of fact and on the entire record here, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union represents Respondent's employees in the following unit (the unit) which is appropriate for bargaining within the meaning of Section 9 of the Act:

All production and maintenance employees employed at its plant located at highway 218 North, Cedar Falls, Iowa; excluding office clerical employees, quoters-expeditors, professional employees, guards and supervisors as defined in the Act, and all employees employed at its Office, Engineering and Technical Centers located at 201 Washington Street, Cedar Falls, Iowa and all other employees.

4. Respondent violated Section 8(a)(5) and (1) of the Act on January 4, 1993, by unilaterally terminating without notifying the Union or providing it an opportunity to bargain the following unit employees' rights: (1) the right to work on personal projects on Respondent's premises; (2) the right to use Respondent's tools at home or at work; and, (3) the right to use Respondent's parts and parts ordering offices.

5. The unfair labor practice described above is an unfair labor practice affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Doerfer Engineering, a division of Container Corporation of America, an affiliate of the Jefferson Smurfit Corporation, Cedar Falls, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to notify the Union and afford it an opportunity to bargain concerning a decision to discontinue Respondent's practice of affording unit employees the right to use Respondent's tools at work and at home on their personal projects, to use Respondent's facilities for personal projects and to use Respondent's parts and ordering facilities for personal projects.

(b) Terminating the practices without first notifying the Union and affording it an opportunity to bargain respecting such decision.

(c) In any like or related manner violating the provisions of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate Respondent's practice of affording unit employees the right to use Respondent's tools at work and at home on their personal projects, to use Respondent's facilities for personal projects, and to use Respondent's parts and ordering facilities for personal projects.

(b) Make whole any and all unit employees for any and all losses incurred as a result of Respondent's unlawful termination of the above-described practices on January 4, 1993, with interest, as provided in the remedy section of this decision.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order and further to ensure that the terms of this Order have been fully complied with.

(d) Post at its Cedar Falls, Iowa machine shop facility copies of the attached notice marked "Appendix II."² Copies of the notice, on forms provided by the Regional Director in English and such additional languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX II

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail to notify the Union and afford it an opportunity to bargain concerning a decision to discontinue Respondent's practice of affording unit employees the right to use Respondent's tools at work and at home on their personal projects, to use Respondent's facilities for personal projects, and to use Respondent's parts and ordering facilities for personal projects.

WE WILL NOT terminate the practices without first notifying the Union and affording it an opportunity to bargain respecting such decision.

WE WILL NOT in any like or related manner violate the provisions of the National Labor Relations Act.

WE WILL instate our practice of affording unit employees the right to use our tools at work and at home on their per-

sonal projects, to use our facilities for personal projects, and to use our parts and ordering facilities for personal projects.

WE WILL make whole any and all unit employees for any and all losses incurred as a result of our unlawful termination

of the above-described practices on January 4, 1993, with interest.

DOERFER ENGINEERING, A DIVISION OF CONTAINER CORPORATION OF AMERICA, AN AFFILIATE OF THE JEFFERSON SMURFIT CORPORATION